Supreme Court, U.S.
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No

In The

Supreme Court of the United States

Thomas J. Yarcheski,
Petitioner
v.
Kevin Reiner, Celia Miner, and Johnson, Heidepreim, Miner, Marlow & Janklow, LLP,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE SOUTH DAKOTA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Yarcheski v. Reiner, Miner, and Johnson, Heidepreim, Miner, Marlow & Janklow, LLP*, 669 NW2d 487 (SD 2003 108), the South Dakota Supreme Court used a standard of review called "substantial compliance" to determine whether the non-renewal of a faculty contract at the University of South Dakota violated the due process provisions of the negotiated labor-management contract. The South Dakota Supreme Court relied on the definition of "substantial compliance" used earlier by the Utah Supreme Court in 1981. Although "substantial compliance" is rationally appealing to excuse an "i" that is not dotted and a "t" that is not crossed, this standard of review is constitutionally vague and it can dismantle the due process rights and protections carefully built into a labor-management contract. The standard of review called "substantial compliance" can also be used to abrogate stipulations by the parties, and to camouflage violations of academic freedom.

The questions presented by this case are:

1. Whether the standard of review called "substantial compliance" is constitutionally vague.
2. Whether the constitutional vagueness of the standard of review called "substantial compliance" allowed the improper substitution of the Court's will over the lawful will of the parties in a negotiated labor-management contract.
3. Whether the nonrenewal of the Petitioner's faculty contract by the University of South Dakota was arbitrary and capricious.
4. Whether the standard of review called "substantial compliance" camouflaged a violation of academic freedom by the University of South Dakota in allowing student opinion surveys to control the nonrenewal of a faculty contract.

PARTIES TO THE PROCEEDINGS BELOW

All the parties to the proceedings below are listed in the caption on the cover page.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Thomas J. Yarcheski petitions for a writ of certiorari to review the judgment of the South Dakota Supreme Court.

OPINIONS BELOW AND JURISDICTION

The Appendix accurately reproduces the Memorandum Opinion from the First Judicial Circuit Court (Yankton, South Dakota), filed August 12, 2002 (Appendix A), and the Opinion of the South Dakota Supreme Court, filed September 3, 2003 (Appendix B). The South Dakota Supreme Court denied (and filed) the Petitioner's request for rehearing without elaboration on October 21, 2003 (Appendix C). This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The First Amendment to the U. S. Constitution, made applicable to the states by the Fourteenth Amendment, provides in relevant part: "Congress shall make no law * * * abridging the freedom of speech, or of the press." U. S. Const. Amend. I.

The Fifth Amendment to the U. S. Constitution provides in relevant part: "No person shall be * * * deprived of life, liberty or property, without due process of law." U. S. Const. Amend V.

The Fourteenth Amendment to the U. S. Constitution provides in relevant part: "No state shall * * * deprive any person of life, liberty, or property, without due process of law." U. S. Const. Amend. XIV.

STATEMENT OF THE CASE

This case began as a grievance action by the Petitioner, Thomas J. Yarcheski, against the University of South Dakota and the South Dakota Board of Regents for the nonrenewal of his faculty contract. The grievance was governed by a negotiated labor-management contract between the Council of Higher Education (a recognized collective bargaining agent) and the South Dakota Board of Regents (hereafter referred to as the "COHE contract," or "BOR/COHE contract," or "COHE"). The Petitioner, Thomas J. Yarcheski, had retained attorney Celia Miner and her law firm of Johnson, Heidepreim, Miner, Marlow & Janklow, LLP (Yankton, South Dakota) to represent him. At the time, attorney Kevin Reiner was an associate of the firm. During the judicial process, the Petitioner's attorney missed a filing deadline in 1995 and the case was dismissed. After appeal of the dismissal was denied by the South Dakota Supreme Court, the original case became a case of legal malpractice. The legal malpractice complaint commenced on January 28, 2000. The case-within-a-case was the grievance action against the University of South Dakota and the South Dakota Board of Regents that was started in 1992.

Contrary to judicial custom, neither the First Judicial Circuit Court (Yankton, South Dakota), nor the South Dakota Supreme Court ever considered the issue of legal malpractice for missing the filing deadline. In ruling against the Petitioner, both focused exclusively on the underlying case-within-a-case involving the grievance against the University of South Dakota.

In *Yarcheski v. Reiner, Miner, and Johnson, Heidepreim, Miner, Marlow & Janklow, LLP*, 669 NW2d 487 (SD 2003 108), both the South Dakota Supreme Court, and the lower First Judicial Circuit Court, used the standard of review called "substantial compliance" to determine whether the due process provisions of the labor-management

contract had been violated. Both, however, defined the standard differently. In the lower court, the First Judicial Circuit Court, the standard focused on "contractual violations" and how they "prejudiced" the Petitioner's "substantial rights." The complete definition by the lower court stated: "Substantial compliance with the contract procedures is all that is necessary. It need not be perfect. The burden is on the plaintiff to show that the claimed contractual violations prejudiced his substantial rights." (Appendix A, p. 14). The Circuit Court referenced *Beville v. University of South Dakota*, 420 NW2d 9 (SD 1988). The Circuit Court's reference to "contract procedures" was non-specific, and instead of holding violations of guaranteed due process provisions to be presumptively prejudicial, the lower court added the burden of proof to the faculty member.

In contrast, the standard of review called "substantial compliance" used by the South Dakota Supreme Court focused on the "substantial interests" of the parties to the negotiated labor-management agreement being "in fact satisfied and protected." The complete definition used by the South Dakota Supreme Court stated: "While exact conformance with the precise terms of the termination procedures is doubtless the least controversial course, so long as the substantial interests those procedures are designed to safeguard are in fact satisfied and protected, failure to conform to every technical detail of the termination procedure is not actionable." (Appendix B, p. 32.) The South Dakota Supreme Court was relying on the Utah Supreme Court in *Piacitelli v. Southern Utah State College*, 636 P2d 1063, 1067 (Utah 1981). The Utah Supreme Court was narrowly considering "termination procedures," and not broader issues such as the evaluation procedures, procedures for corroborative investigations of performance, and evaluation criteria.

The South Dakota Supreme Court, in framing its definition of "substantial compliance" also cited *Stensrud v.*

Mayville State College, 368 NW2d 519, 522 (ND 1985): "Generally, substantial compliance with the procedural requirements for termination is sufficient if their purpose is fulfilled." (Appendix B, p. 32.) Like the Utah Supreme Court, the North Dakota Supreme Court focused narrowly on "requirements for termination," not the broader issues associated with this case. In contrast to the other definitions of the standard of "substantial compliance," the North Dakota Supreme Court's definition rested on the "purpose" of a procedural requirement and whether it was "fulfilled."

In reviewing the underlying case-within-a-case, the provisions of the COHE contract that the two courts implicitly found insubstantial were provisions that the parties to the contract held to be mandatory. Those provisions were explicitly worded. The parties to the labor-management contract expressed their sensitivity to the wording of those provisions early in the contract: "'Will' is a verb having the mandatory sense of 'shall' or 'must.' It is a word of certainty, while the word 'may' is one allowing discretion." All of the contract provisions implicitly held by both courts to be insubstantial had the verbs of either "will," or "shall," or "must."

The case-within-a-case began in 1991 when the Petitioner accepted a tenure track appointment as Associate Professor of Health Administration, School of Business, University of South Dakota. Within the system of performance evaluation specified by the COHE contract, the Petitioner expected continued employment. The Petitioner's previous academic appointment was at St. Joseph College, Standish, Maine, where the president of that college (in multiple sworn statements) described the Petitioner's teaching performance as "masterful." [The South Dakota Supreme Court, in a footnote in its Opinion, and without any supporting evidence in the record, held that the Petitioner's contract at St. Joseph College "was also not renewed because of his teaching performance." (Appendix B, p. 22).]

On January 31, 1992, approximately halfway through his first year of service, the Petitioner's immediate supervisor/department head, Professor Michael Myers, JD, submitted a letter to the dean of the School of Business, Jerry Johnson, recommending that Yarcheski's faculty contract not be renewed. His letter failed to state a reason. As defined by the COHE contract, Yarcheski was a "faculty unit member," and according to the contract, "All faculty unit members will be evaluated annually." Myers had failed to do the mandatory evaluation on Yarcheski. The verb "will," as noted above, was a verb of certainty. The university had no discretion in that matter, and the requirement that "all" faculty will be evaluated annually had no exceptions or qualifications of any kind. The COHE contract was void of any language that referred to first-year faculty as "probationary," and void of any language that segregated first-year faculty into a separate class.

As noted, prior to making his recommendation, Myers had failed to complete the mandatory evaluation system specified in the COHE contract. He invented his own system. Approximately ten days before he made his recommendation, Myers had put together his own unique scheme for evaluating the Petitioner. In his own written words, Myers stated that his purpose was to provide "a clear and prompt process for assessing your [Yarcheski's] performance." Myers further wrote that his evaluation plan "will allow us to substantiate a rationale for contract renewal, or if we are unable to obtain a more favorable assessment, provide a fair and objective basis for nonrenewal." His scheme was grossly inconsistent with the COHE contract, and it was never completed. Despite his intention to create an "objective basis for nonrenewal," Myers failed to put his evaluation of Yarcheski in writing. As specified by the COHE contract, "the performance evaluation will be in written form and will be signed by the department head." That requirement was mandatory.

[When the legitimacy of Myers' evaluation scheme for Yarcheski was later challenged at an evidentiary hearing held on August 20, 1992, in conjunction with the administrative law process, the attorney for the University of South Dakota and the South Dakota Board of Regents stated: "I'll stipulate that the university has only one evaluation system provided in COHE." His reference to "only one" made Myers' scheme, and all others outside the COHE contract, illegitimate. When the South Dakota Supreme Court stated in its Opinion that "nothing in the evaluation and nonrenewal provisions [of the COHE contract] indicates that the evaluation is the exclusive source of information for personnel decisions," it was abrogating the stipulation made by the university's attorney. (Appendix B, p. 35).]

The purposes of performance evaluation are clearly and rationally evident, and as noted above, were understood and accepted by Yarcheski's supervisor, Myers. The COHE contact, furthermore, specifically stated that one of the purposes of faculty evaluation is to "provide basic information for personnel decisions such as discipline, contract renewal, salary and pay matters, tenure and promotion." According to the COHE contract, as will be elaborated later, "the notice [of nonrenewal] will state the reasons for the decision." The university was specifically required by the COHE contract to give a reason for not renewing a faculty member's contract, and as undisputed by the Circuit Court and the South Dakota Supreme Court, the reason had to be based on performance (in contrast to, for example, religious affiliation, or sexual preference, or political party). As noted, the university's attorney stipulated that the university had "only one" evaluation system found in the COHE contract. The COHE contract's evaluation system, in other words, generated any and all reasons given for not renewing a faculty member's contract.

On February 7, 1992, seven days after the Petitioner's supervisor submitted a letter to the dean, Jerry Johnson,

recommending that the Petitioner's contract not be renewed, Johnson submitted a memorandum to Steven Hazlett, vice president for academic affairs, recommending that the Petitioner's faculty contract not be renewed. His memorandum had no performance evaluation attached, and it failed to state a reason for the recommendation. According to the COHE contract, "The vice president/dean will review the completed evaluation and make appropriate comments to the president about contract renewal, augmentation monies, promotion, or tenure, and/or performance." The case involved contract renewal. The dean of the School of Business had no performance evaluation to review. Myers had failed to do one. The system of faculty evaluation specified by the COHE contract required either the dean, or the vice president for academic affairs, to sign the completed performance evaluation. It further required the administrator who reviewed the completed performance evaluation to attest, "I have reviewed these comments and ratings." Those requirements were mandatory.

In response to the recommendations made by the Petitioner's supervisor and dean, on February 12, 1992, the Petitioner filed a grievance with the university president, Betty Turner Asher, contending that the COHE contract had been violated. Through letter dated February 19, 1992, the university president replied and indicated that the grievance was premature because she had not yet sent him a notice of non-renewal. As noted earlier, notices of non-renewal were required to state the reasons for the action. And as will be noted later, the reason that the president would finally give would be performance-based.

After Yarcheski had filed his grievance, the university president, Betty Turner Asher, contacted the dean of the School of Business, Jerry Johnson, who in turn contacted Yarcheski's supervisor, Michael Myers. Myers then hurriedly tried to prepare a "Professional Staff Evaluation" on Yarcheski as prescribed by the COHE contract. Like the

unique scheme Myers had invented for evaluating Yarcheski a few weeks earlier, Myers never completed it. In the margin of the evaluation Myers hastily completed on Yarcheski, he indicated in a hand-written note that he had sent copies to the dean, Jerry Johnson, and to the university president, Betty Turner Asher. Myers dated what was now the second so-called evaluation on Yarcheski February 19, 1992.

In the evaluation form done on Yarcheski, Myers wrote only one sentence concerning Yarcheski's teaching performance: "Teaching—Student evaluations indicated students did not learn relevant material, indicated assignments were not helpful, and there was a lack of systematic presentations. Rating—Unsatisfactory." The "student evaluations" used by Myers, as corroborated later through is testimony, were in fact student opinion surveys. The above sentence represents the entire text of Myers' evaluation of Yarcheski's teaching. He relied on nothing else but student opinion surveys. In simple but powerful language, the COHE contract stated: "Student opinion surveys will not be used as the controlling criteria for personnel actions." The COHE contract further states that a personnel action includes "discipline, contract renewal, salary and pay matters, tenure, and promotion." The action in this case concerned contract renewal.

[The "student opinion surveys" that Myers relied on in evaluating Yarcheski's teaching performance are not contained in the record of this case. At the evidentiary hearing held on August 20, 1992, the university failed to produce them and enter them into the record. Although Yarcheski had only been on faculty five months when Myers evaluated his performance, Myers also rated his research as "unsatisfactory."]

If Myers had, in fact, suspected deficiencies in Yarcheski's teaching performance because of student opinion surveys, then the COHE contract required him to

take another step: "The department head... shall investigate such deficiencies by evaluative means, other than by student opinion surveys." That requirement was mandatory. The COHE contract further required that "Only if such investigation corroborates the results of the student opinion surveys shall the faculty unit member's department head include in the evaluation the deficiencies in performance suggested in the student opinion surveys."

Myers never conducted a corroborative investigation concerning Yarcheski's teaching. Approximately four weeks before Myers did his second evaluation on Yarcheski dated February 19, 1992, he had observed one of Yarcheski's classes. The associate dean, Robert Reinke, also attended that class. (According to the COHE contract, Reinke had no evaluative or supervisory role with respect to either Yarcheski or Myers; he attended the class as Myers' friend.) Neither Myers nor Reinke ever prepared a report of their visit. Yarcheski testified that immediately after the class Myers told him that the class was "too good to be true." The fact that Myers and Reinke never prepared a report concerning their one classroom visit, and the fact that Myers never conducted a corroborative investigation, would later by used by both of them at the evidentiary hearing to give a "third" evaluation of Yarcheski using their testimony.

As noted, Myers relied exclusively on student opinion surveys in his evaluation of Yarcheski's teaching. If Myers had done a "corroborative investigation," then the COHE contract required still another step: "If the student opinion surveys indicate a deficiency in performance of duties, the results of the department head's corroborative investigation, as well as the faculty member's response to the [student] survey, must be attached [to the evaluation]." This requirement, given the deliberate use of the verb "must," was mandatory. Yarcheski had nothing to respond to other than the improper control exercised by student opinion surveys.

Myers also failed to complete two other explicit requirements required by the COHE contract in his evaluation of Yarcheski. The first requirement stated: "The faculty unit member's department head shall prepare a statistical profile and a narrative summary of the student opinion surveys." Like the results of the "corroborative investigation" described above, that statistical profile and narrative summary "will be attached and made a part of the performance evaluation." Myers failed to prepare any such statistical profile and narrative summary. The second requirement stated: "Upon request to the department head, a faculty unit member shall receive in writing the guidelines and performance expectations intended to be used for the performance and evaluation of the faculty unit member." Despite two written requests by Yarcheski to Myers, Myers never produced any statement concerning the guidelines and performance expectations he intended to use in Yarcheski's evaluation. Myers did, however, attach to his so-called second evaluation of Yarcheski the rankings of all faculty in the School of Business according to student opinion surveys. That was the only attachment Myers provided to Yarcheski's evaluation. Myers found those rankings important.

On February 27, 1992, as required by the COHE contract, Myers held a meeting with Yarcheski to inform him that he had recommended that his faculty contract not be renewed. Robert Reinke, associate dean, was present as a witness for the administration. (Myers and Reinke were astute enough to make certain a witness was present, but neither had ever prepared a report of their one visit to Yarcheski's class, and Myers failed to fulfill all of the due process requirements mandated by the COHE contract.) On the same day, after that meeting, the dean of the School of Business, Jerry Johnson, sent a memorandum directly to the university president, Betty Turner Asher, recommending for a second time that Yarcheski's faculty contract not be renewed. Johnson's memorandum to the president bypassed

his supervisor, the vice president for academic affairs, Steven Hazlett. Johnson's second recommendation directly to the president failed to cite a reason (like his first), and it failed to attach the performance evaluation that was done on Yarcheski by Myers on February 19, 1992. Johnson's memorandum failed to indicate in any way that he had reviewed Yarcheski's performance evaluation. [During the discovery process prior to the evidentiary hearing held on August 20, 1992, the university produced the faculty evaluation done on Yarcheski by his supervisor Myers on February 19, 1992. It had the signature of the vice president for academic affairs, but was not dated.]

Through a letter from the university president, Betty Turner Asher, dated February 29, 1992, Yarcheski was given notice that his faculty contract would not be renewed. The letter cited a reason for the personnel action: "inadequate teaching." Clearly, the president gave a performance-based reason. Myers had rated both Yarcheski's teaching and research as "unsatisfactory," but the university president focused only on teaching. [At the evidentiary hearing held on August 20, 1992, in conjunction with the administrative law process, the university president testified that the evaluation done on Yarcheski by his supervisor, Myers, on February 19, 1992, was "irrelevant" to the non-renewal action. The university president did not elaborate on how or where she received the information to conclude that Yarcheski's teaching was "inadequate." In effect, she created a mystery.]

On April 8, 1992, approximately five weeks after the university president had notified Yarcheski that his faculty contract would not be renewed because of "inadequate teaching," the university president asked Yarcheski's supervisor, Myers, to draft a letter summarizing the basis for not renewing Yarcheski's faculty contract. In his draft for the president, Myers wrote: "The primary materials for supporting the recommendation [for not renewing your

faculty contract] are contained in the substantial negative commentary contained in the Harvard evaluation forms as well as the USD evaluation form which place your performance below acceptable standards." The "Harvard evaluation forms," and the "USD evaluation form" are in fact student opinion surveys. Like his previous written statement on February 19, 1992, concerning Yarcheski's teaching, Myers failed to cite any other criteria other than student opinion surveys. He did not even allude to his one visit to Yarcheski's class.

The entire record of the case contains only two written sentences from Yarcheski's supervisor, Myers, concerning Yarcheski's teaching performance. Myers, a member of the South Dakota Bar, also taught courses at the university's School of Law, and he knew the importance of the words he used. The only two sentences Myers wrote concerning Yarcheski's teaching performance relied exclusively on one criterion: student opinion surveys.

Although the facts and arguments were fully elaborated, both the First Circuit Judicial Court, and the South Dakota Supreme Court, failed to explicitly address the issue of student opinion surveys being the controlling criteria in the nonrenewal of Yarcheski's contract.

As noted earlier, in pursuing the administrative law process, Yarcheski's attorney, Celia Miner, missed a filing deadline in 1995 and the case was dismissed. The dismissal was upheld by the South Dakota Supreme Court late in 1996. Celia Miner's representation of Yarcheski ended on January 8, 1997.

Also as noted earlier, the legal malpractice action against Celia Miner and her law firm commenced on January 28, 2000. Summary judgment in favor of Celia Miner and the other Defendants was filed in the First Judicial Circuit Court on September 11, 2002. The Plaintiff/Petitioner filed a notice of appeal with the South Dakota Supreme Court on November 8, 2002. On September 3, 2003, the South

Dakota Supreme Court filed its Opinion affirming the judgment of the First Judicial Circuit Court. The Petitioner's motion to the South Dakota Supreme Court for a rehearing was denied (and filed) on October 21, 2003 (Appendix C).

REASONS FOR GRANTING THE WRIT

Application of the standard of review called "substantial compliance" in the case of *Yarcheski v. Reiner, Miner, and Johnson, Heidepreim, Miner, Marlow & Janklow, LLP*, 669 NW2d 487 (SD 2003 108), had several consequences for justice.

1. On its face, the standard of review called "substantial compliance" used by the South Dakota Supreme Court appears to make it easier to enforce the due process protections of the Fifth and Fourteenth Amendments. It discourages trivial challenges at the extreme margins of the Constitution. (see, for example, *Krukar v. Alexander*, 386 F. Supp. 1112 (N.D. Ill., 1974), where a federal district court held that the fourteen days advance notice of termination given to a probationary employee of the Internal Revenue Service, instead of the required fifteen days, was not unconstitutional.) But the standard of review called "substantial compliance" can also violate the Fifth and Fourteenth Amendments. Below the surface, because of its vagueness, "substantial compliance" can dismember the cardinal due process rights and protections consciously built into a negotiated labor-management contract. It can even be used to impose the will of a court contrary to the lawful will of the parties.

Traditionally, courts have respected the right of universities to judge the professional performance of faculty. The COHE contract reflects that tradition: "If the grievance concerns nonrenewal, denial of promotion, or denial of tenure, the grievance review will be limited to determining whether the decision was the result of failure to

follow procedures, unless otherwise provided in this agreement. The burden of proof, in such cases, shall rest with the grievant." In this case, the university's failures to fulfill the mandatory due process provisions explicitly outlined in the COHE contract were profound. They should be regarded are presumptively prejudicial to the Petitioner and contrary to his interests and rights. In this case, as "otherwise provided" in the contract, student opinion surveys were prohibited from controlling the personnel action.

2. As required by the COHE contract, the Petitioner was given a reason for not renewing his faculty contract, and as expected, and without dispute by the courts, that reason was based on performance (i.e., "inadequate teaching"). The body of relevant court decisions overwhelming supports the conclusion that when reasons are given for nonrenewal or termination, those reasons must be performance-based. The attorney for the South Dakota Board of Regents stipulated that there was only one system of evaluation concerning faculty performance: "I'll stipulate that the university has only one evaluation system provided in COHE." The reference to "only one" has a clear and literal meaning. But the president of the University of South Dakota testified that the performance evaluation done on the Petitioner by his supervisor was "irrelevant" to her decision not to renew the Petitioner's faculty contract. The university president created a mystery, a mystery that lingers.

Both the South Dakota Supreme Court, and the lower First Judicial Circuit Court, ignored the fact that the university president had no choice, as mandated by the COHE contract, and stipulated by the university's attorney, except to rely on the performance evaluation done on the Petitioner by his immediate supervisor. Both courts made no attempt to solve the mystery of how the university president arrived at the performance based reason she gave the Petitioner for not renewing his faculty contract ("inadequate teaching"), and implicitly found the contractual violation

insubstantial. Neither court held the university president's decision not to renew the Petitioner's faculty contract to be arbitrary and capricious. The South Dakota Supreme Court not only failed to solve the mystery of where the university president got the performance based information for concluding that the Petitioner had "inadequate teaching," but also abrogated the stipulation made by the attorney for the Board of Regents. In its Opinion, the South Dakota Supreme Court stated: "But nothing in the evaluation and nonrenewal provisions [of the COHE contract] indicates that the evaluation is the exclusive source of information for personnel decisions." (Appendix B, p. 35).

When the Opinion of the South Dakota Supreme Court is extrapolated, the results are sinister. The university president was free to receive information from any party, in any manner, without a written record, without corroboration, without disclosure of the evaluative criteria, and without disclosure of conflicts or bias in making a decision about not renewing a faculty member's contract. According to the Opinion of the South Dakota Supreme Court, the university president was also free to receive information anonymously, or if the parties were known, to withhold their identities. In effect, the Opinion of the South Dakota Supreme Court opened the door to Star Chamber proceedings and essentially gutted the COHE contract of its due process rights and protections.

The nonrenewal of the Petitioner's faculty contract, in light of the president's statement that the performance evaluation done on the Petitioner by his immediate supervisor was "irrelevant" to her decision, and in light of the explicit procedural requirements of the COHE contract, was done without any known rational basis. The necessary conclusion is that the president's action was arbitrary and capricious. The president could have heard voices telling her what to do.

When the university president stated that the COHE style evaluation done on the Petitioner by his supervisor was "irrelevant" to her decision not to renew the Petitioner's faculty contact she assumed two significant burdens. First, she had to prove that she was not violating the COHE contract, and second, she had to prove that she was not acting arbitrarily and capriciously. In both instances, the university president failed. The basis for her decision remains a mystery, a mystery that was highly prejudicial to the Petitioner's rights and destructive to his interests, and a mystery that failed to fulfill the purposes of the due process provisions in the COHE contract. On their faces, no definition of "substantial compliance" cited by the South Dakota Supreme Court would permit such a mystery to stand without judicial reprimand.

3. As required by the COHE contract, when requested by a faculty member, the supervisor must provide a written statement of the guidelines and performance expectations the supervisor intended to use in the faculty member's performance evaluation. Despite two written requests by the Petitioner to his supervisor for that written statement, none was ever provided. [What the supervisor attached to the Petitioner's faculty evaluation were the rankings of all faculty in the School of Business according to student opinion surveys.] Both courts implicitly found the supervisor's failure to disclose the guidelines and performance expectations he used in the Petitioner's evaluation to be insubstantial, and the South Dakota Supreme Court failed to even acknowledge the existence of that requirement.

4. As required by the COHE contract, if student opinion surveys suggested a deficiency in a faculty member's performance of assigned duties, then the supervisor had to conduct a corroborative investigation of those deficiencies "by valuative means, other than student opinion surveys." The COHE contract further required that the results of the

supervisor's corroborative investigation be in writing, and attached to, and made a part of, the faculty member's performance evaluation. While the Petitioner's supervisor attended one of his classes, he never produced any results of a corroborative investigation, and failed to even mention his class observations in his two written sentences (months apart) about Yarcheski's teaching. There were no results from a corroborative investigation attached to, and made a part of, the Petitioner's performance evaluation. The Petitioner had no opportunity to respond to his supervisor's corroborative investigation, as allowed by the COHE contract, because the investigation was never done. Both courts implicitly found that violation insubstantial, and the South Dakota Supreme Court failed to even acknowledge the existence of that requirement. As noted, the university also failed to produce, and enter into the record, the student opinion surveys that were relied upon by the Petitioner's supervisor.

The COHE contract also required the supervisor to prepare a "statistical profile and a narrative summary of the student opinion surveys." Like the results of a corroborative investigation, the supervisor's statistical profile and narrative summary of student opinion surveys was supposed to be attached to, and made a part of, Yarcheski's evaluation. Myers, the supervisor, failed to do that. Both courts implicitly found that violation insubstantial, and both courts failed to even acknowledge the existence of that requirement.

At the evidentiary hearing held on August 20, 1992, the Petitioner's supervisor, and the associate dean, painted a picture of deficiency concerning the Petitioner's teaching performance. They used their testimony (months after the fact) to paint that picture, testimony that was duly rebutted. They were, in effect, trying to "amend" the grossly incomplete written record with their testimony. And they did it long after their good faith adherence to the requirements of the COHE contact, and their competence as

an academic administrators, had been called into question. There are, in fact, no documents of any kind in the record that support the negative picture painted by the Petitioner's supervisor, Myers, and the associate dean, Reinke, about the Petitioner's teaching performance. Only their testimony at the evidentiary hearing.

The due process requirements of the COHE contract were intended to prevent such occurrences, to safeguard the integrity of the process, and to protect the interests of faculty, not to suborn fabrications after the fact. No rational person would tolerate such a moral hazard. In its Opinion, the South Dakota Supreme Court relied extensively on the testimony of the Petitioner's supervisor, and the associate dean, rather than the explicit due process requirements of the COHE contract. (Appendix B, *passim*). This was done despite rebuttal testimony. The record the supervisor was required to produce by the COHE contract (the record that the university administrators were required to review in making a nonrenewal decision) does not exist.

Such reliance on testimony long after the critical events have taken place means that the administrators at the University of South Dakota, in retrospect, will always get it right and always justify their actions. In effect, by relying on the testimony of the Petitioner's supervisor, and associate dean, the South Dakota Supreme Court was permitting a "third" evaluation of the Petitioner. The supervisor, Myers, had invented his own scheme to evaluate the Petitioner late in January of 1992, but never completed it and never put anything in writing. Myers tried a second time late in February, 1992, but cited only student opinion surveys, and failed to complete all of the due process requirements mandated by the COHE contract. Myers tried a third time using his testimony at the evidentiary hearing on August 20, 1992. As stipulated by the university's attorney, the university had only one evaluation system—the one found in

the COHE contract. That "one" system did not allow for amending the record with testimony months after the fact.

If the Petitioner's supervisor, Myers, was giving verbal utterances about the Petitioner's teaching performance early in 1992, before the Petitioner received notice that his faculty contract would not be renewed, then it is reasonable to believe that the university president did not hear them, or if she did, ignored them. The university president testified that the written evaluation Myers had done on the Petitioner was "irrelevant." It is also reasonable to believe that she found his verbal utterances equally as "irrelevant." Based on her testimony, the university president was getting her information about the Petitioner from other, unidentified sources.

5. The conclusion reached by the South Dakota Supreme Court concerning the source of information for faculty personnel decisions should be seen as an error: "But nothing in the evaluation and nonrenewal provisions [of the COHE contract] indicates that the evaluation is the exclusive source of information for personnel decisions." (Appendix B, p. 35). The court's conclusion is inconsistent with the COHE contract and it abrogated a critical stipulation by the university legal counsel: "I'll stipulate that the university has only one evaluation system provided in COHE." The reason given by the university president for not renewing the Petitioner's faculty was a performance-based reason, and according to the stipulation, there was one (and only one) evaluation system for arriving at the reason.

The stipulation made by the university's legal counsel leads to two possible conclusions concerning the action taken by the university president. First, the university president acted arbitrarily and capriciously when she notified the Petitioner that his faculty contract would not be renewed because of "inadequate teaching." The evidence in the record supports that conclusion. The university president had no direct knowledge of the Petitioner's teaching

performance, and her reliance on sources of information other than the performance evaluation system provided in the COHE contract was highly prejudicial to the Petitioner and his substantial rights, was a clear violation of the COHE contract, and was a serious violation of the expressed interests of the Council of Higher Education (COHE) and the faculty it represented.

The second possible conclusion concerns the university president's testimony. This conclusion is speculative. Either the university president was confused when she stated that the performance evaluation was "irrelevant," or more adversely, she was intentionally tying to conceal the fact that the COHE system of evaluation had been grossly violated, and that the only criterion for the recommendations she had received concerning the nonrenewal of the Petitioner's contract was student opinion surveys.

The university president knew that the COHE contract's explicit prohibition against using student opinion surveys as the controlling criteria in personnel actions had been violated, as well as all of the contract's cardinal due process rights and protections. The university president knew those facts because, as indicated by the marginal note in the evaluation done on the Petitioner by his supervisor on February 19, 1992, the supervisor sent her a copy. Her knowledge of those facts was reinforced when, on April 8, 1992, Yarcheski's supervisor, Myers, drafted a letter for the president's signature summarizing the reasons for not renewing Yarcheski's faculty contract. In that draft letter, once again, the exclusive evaluative criterion used by Myers was student opinion surveys.

6. The fact that Myers failed to fulfill the mandatory due process requirements of the COHE contract concerning Yarcheski's evaluation—there was no statement of the guidelines and performance expectations, no corroborative investigation, no statistical profile and narrative summary of student opinion surveys—meant that Yarcheski had no

opportunity to challenge the basis for Myers' conclusions. There were only the student opinion surveys, student opinion surveys that the university never produced. The fact that the university president held Myers' evaluation on Yarcheski of February 19, 1992, to be "irrelevant" to her decision not to renew Yarcheski's contract also meant that Yarcheski, again, had no opportunity to challenge the basis for her conclusion. In *Perry v. Sindermann*, 408 US 593, this Court definitively established the right to such an opportunity.

7. If the evaluation done on the Petitioner by his supervisor on February 19, 1992, is accepted by this Court as the only contractually legitimate source of performance information about the Petitioner and the non-renewal of his contract, and if this Court dismisses the testimony of the Petitioner's supervisor given months after the critical events had taken place as a self-serving violation of the COHE contract, then this Court should also conclude that the Petitioner's academic freedom was violated. The violation of his academic freedom was camouflaged by the use of the standard of review called "substantial compliance." The Petitioner's teaching was controlled not by his faculty colleagues, or the university's academic administrators, but instead by students. That control violated the Petitioner's freedoms under the First Amendment and it resulted in the nonrenewal of his tenure track faculty contract. This Court has previously protected First Amendment freedoms in generally similar circumstances. (See *Mt. Healthy City School District Board of Education v. Doyle*, 429 US 274, and *Pickering v. Board of Education*, 391 US 563.) And, within the legacy of this Court's decisions, those freedoms are guaranteed to both tenured and non-tenured faculty. (See *Perry v. Sindermann*, 408 US 593.)

The decision not to renew the Petitioner's faculty contract was made, in essence, by students through their student opinion surveys. For reasons never established by the university through the mandatory due process provisions

of the COHE contract, the students disliked the Petitioner's exercise of his constitutionally protected freedoms under the First Amendment. The university's administrators blindly followed student opinion surveys. When the Petitioner's supervisor, Myers, attached to the Petitioner's evaluation the rankings of all faculty in the School of Business according to student opinion surveys he was making a profound statement about student opinion surveys in his evaluation of the Petitioner and their importance at the School of Business.

When Myers invented his first scheme for evaluating the Petitioner late in January of 1992, outside the boundaries of the COHE contract, one part of his scheme required the Petitioner to prepare a "plan for corrective action" to "concerns as expressed in the student evaluations." Myers extracted criticisms from eight student opinion surveys and expected the Petitioner's "plan for corrective action" to remedy those criticisms. One student criticism stated: "Asks questions from both books, but does not lecture over them." Another stated: "Does not teach what we want at this point in our education." And another: "We never told what to read or when to." Myers was a blind servant of the students.

As stated in the COHE contract, "subject to accepted standards of professional responsibility," academic freedom "is intended to guarantee those rights which are recognized as flowing from the First Amendment to the United States Constitution." The contract defines academic freedom to include "the right to study, discuss, investigate, teach and publish." The contract further states: "Faculty unit members are entitled to freedom in the discussion and presentation of their subject and are privileged to introduce various scholarly views."

Student opinion surveys are a reasonable part of a rational program for evaluating faculty. But student opinion surveys should only sensitize faculty and academic administrators, not control them. As noted above, the COHE contract, like the courts, allowed the University of South

Dakota to temper First Amendment freedoms with "accepted standards of professional responsibility." Student opinion surveys do not constitute "standards of professional responsibility," either accepted or unaccepted. Students are not professionals, and students are not members of the academy. Apart from the last-ditch efforts by the Petitioner's supervisor, and associate dean, to establish cause for the personnel action through their testimony at the evidentiary hearing on August 20, 1992, there is nothing in the record that even suggests the Petitioner's teaching did not conform to accepted standards of professional responsibility. The efforts by Myers and Reinke to establish cause with their testimony were, it appears, an exercise in self-delusion. According to her testimony, the university president held the supervisor's evaluation of the Petitioner to be "irrelevant," and it is reasonable to believe, also the associate dean's. The university president was getting her information about the Petitioner from other, unidentified sources.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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